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No. 197

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

BANK OF NEW YORK AND TRUST COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to re-

view the judgments of the Circuit Court of Appeals entered in the above cases on May 27, 1935.

OPINIONS BELOW

The opinion of the District Court in the *Bank of New York* and the *Manhattan Company cases* is reported in 10 F. Supp. 269. The opinions of the Circuit Court of Appeals are not as yet officially reported.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 27, 1935. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

Section 24 of the Judicial Code, as amended, c. 231, 36 Stat. 1087, 1091 (U. S. C., Title 28, Sec. 41), provides in part as follows:

> The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, * * *.

QUESTIONS PRESENTED

1. Whether Soviet decrees dissolving Russian insurance corporations, appropriating their assets and terminating all rights of creditors and stockholders therein, were effective to transfer to the

Soviet Government title to New York assets of such corporations in excess of amounts required for payment of claims arising out of business transacted by such corporations in the United States.

2. Whether the assignment executed in favor of the United States on November 16, 1933, by the Soviet Government (See exchange of letters between President Roosevelt and Maxim Litvinoff, People's Commissar for Foreign Affairs, Union of Soviet Socialist Republics, dated November 16, 1933, Official Publication of the Department of State, Eastern European Series No. 1, pages 13–15) was sufficient to transfer to the United States such assets of the Soviet Government.

3. Whether the action in the State court is an action *in rem* or an action *in personam,* within the rule respecting priority of jurisdiction between Federal and State courts; and even if the State court action is *in rem,* whether that action to which the United States is not a party can defeat the jurisdiction of the Federal court to adjudicate the title of the United States to these assets.

4. Whether Section 24 (1) of the Judicial Code requires the Federal courts to entertain an action in which the United States seeks to recover property claimed by it.

STATEMENT

United States v. *Bank of New York and Trust Company,* the action in which the full opinions of the Circuit Court of Appeals for the Second Cir-

cuit were written, was an action in equity instituted in the District Court for the Southern District of New York for an accounting and to compel the defendant bank to pay over to the United States as the assignee of the Union of Soviet Socialist Republics the funds formerly belonging to Moscow Fire Insurance Company, a corporation organized under the laws of the Imperial Government of Russia. These funds had been turned over to that bank as an agent or depositary of the Moscow Fire Insurance Company in April 1933 by the Superintendent of Insurance of the State of New York under an order of the Supreme Court of the State of New York which provided that the funds should be withdrawn only on the order of a court of competent jurisdiction. These funds, amounting to $1,080,399.54, were the surplus of the assets of the United States branch of this corporation remaining after payment of the claims of its creditors arising out of domestic transactions.[1] In 1925 the funds had been taken into the custody of the Superintendent of Insurance of New York under orders of the New York state courts. Those proceedings, insofar as they related to these funds, were terminated by the order directing the deposit in the

[1] Section 27 of the New York Insurance Law requires foreign insurance corporations, as a condition precedent to doing business in New York, to make a deposit of a certain amount with the Superintendent of Insurance. This deposit, the statute provides, shall be for the "general benefit and security of its policyholders and creditors within the United States."

bank. *Matter of People (Northern Ins. Co.)*, 255 N. Y. 433. Thereafter, in April 1933, a separate action was instituted in the Supreme Court of the State of New York in which plaintiffs were Moscow Fire Insurance Company and Paul Lucke, its surviving director, and in which the defendants were the Bank of New York and Trust Company, as depositary of the funds, and other persons who might have claims against the corporation, either as creditors arising out of foreign transactions, or as stockholders, and in effect seeking an accounting and final settlement of the funds. The funds remain in the depositary bank, although claims have been allowed by a judgment entered on a referee's report which would, if paid, substantially exhaust the funds.

The United States filed its bill of complaint on August 22, 1934, prior to the entry of the above-mentioned judgment. In this bill the United States alleged that in 1918, by decrees of the Soviet Government, Moscow Fire Insurance Company had been dissolved, and all of its right, title, and interest and all the right, title, and interest of all of its stockholders in its property, including the deposit hereinbefore mentioned, were appropriated by the Soviet Government; and that on November 16, 1933, on the occasion of the recognition of the Soviet Government by the United States Government, the Soviet Government had assigned to the United States certain claims against American nationals, including the property in the United States formerly owned by Moscow Fire Insurance

Company. The bill was dismissed by the District Court on the grounds: (1) that the assignment to the United States did not include these particular funds, and (2) that the decrees of the Soviet Government were ineffective to transfer to the Soviet Government title to such assets in the United States, inasmuch as their confiscatory character was contrary to public policy. The Circuit Court of Appeals affirmed the orders of the District Court, not on either of the above grounds and not on the merits, but on the sole ground that prior to the institution of the action in the federal court the funds had been taken into the custody of the New York state court and hence that an action could not be maintained in the federal court which would disturb that custody.

In *United States* v. *President and Directors of the Manhattan Company,* the history of the funds involved is substantially the same as that in the *Bank of New York case,* up to the point when the liquidation proceedings by the Superintendent of Insurance were terminated, and the funds paid to the defendant bank under a similar order of the New York Supreme Court. In the *Manhattan Company* case that deposit was made on November 14, 1933. Thereafter the Northern Insurance Company of Moscow, which had been the owner of the funds, made an assignment of them to the defendant bank as assignee for the benefit of creditors under the New York Debtor and Creditor Law, and the defendant bank was holding the funds as

such assignee at the time the action by the United States in the federal court was commenced. In this case the only proceedings in the State court after the making of the deposit were proceedings instituted by the bank for the determination of claims against the insurance company in accordance with the applicable provisions of the Debtor and Creditor Law. In this case the depository bank, as assignee, has received other funds on behalf of the corporation which at no time have been in the possession of the Superintendent of Insurance. The total of the amounts held by the bank is $332,994.05.

In *United States* v. *Louis H. Pink, Superintendent of Insurance of the State of New York,* the facts are again similar to those in the *Bank of New York case,* so far as concerns the origin of the funds and the taking over of them by the Superintendent of Insurance. In this case, the surplus funds of the First Russian Insurance Company, established in 1827, amounting to $1,170,783.35 (less certain payments made since the bill was filed), are still in the possession of the Superintendent of Insurance. He had satisfied all creditors whose claims arose out of domestic transactions, but had not paid over this surplus for the account of the insurance company at the time when the United States instituted this action in the federal court.

The orders of the District Court in *United States* v. *President and Directors of the Manhattan Com-*

pany and in *United States* v. *Louis H. Pink, Superintendent of Insurance of the State of New York*, were affirmed by the Circuit Court of Appeals for the Second Circuit on the authority of *United States* v. *Bank of New York and Trust Company*.

SPECIFICATION OF ERRORS TO BE URGED

The United States urges that the Circuit Court of Appeals erred:

1. In holding, in the *Bank of New York* and *Manhattan Company* cases, that after the termination of the actions brought by the Superintendent of Insurance to effect payment of creditors whose claims arose out of domestic transactions, and after all such creditors had been paid in full, the State Court retained jurisdiction over the funds in controversy, in view of the fact that by Soviet law the funds had, prior to this time, become the property of the Soviet Government.

2. In holding in the *Bank of New York* and *Manhattan Company* cases that if the Supreme Court of the State of New York had previously acquired exclusive jurisdiction and control over the funds in controversy, it did not relinquish such exclusive jurisdiction and control over the said funds by virtue of its orders that the funds be deposited in the defendant banks, subject to the further order of *any* court of competent jurisdiction.

3. In holding in the *Pink case* that if the State Court acquired jurisdiction over the funds in controversy in 1925, it did not lose such jurisdiction

after the payment of all claims for which the assets of the corporation had been pledged, since by Soviet law that portion of the assets of the corporation not required for this purpose had previous to that time become the property of the Soviet Government.

4. In holding in all three cases that if the State Court had previously acquired jurisdiction over the surplus assets of these corporations after payment of all claims for which these assets had been pledged, it did not on November 16, 1933, lose such jurisdiction, because such surplus became the property of the United States, and because the United States has not consented to be sued respecting such property.

5. In holding in all three cases that the State Court retained exclusive jurisdiction and that it did not on November 16, 1933, lose such jurisdiction over the surplus assets, since the recognition of the Soviet Government by the United States required the State Court to give effect to the Soviet decrees terminating the existence of the corporate plaintiff and the directorship of the individual plaintiff in the *Bank of New York case,* terminating the existence of the corporate assignor in the *Manhattan Company* case and the authority of any persons to make an assignment on its behalf, and terminating the existence of the corporation in the *Pink* case and vesting its assets in the Soviet Government.

6. In holding that the state court action in the *Bank of New York* case and the proceeding in the *Manhattan Company* case, are actions *in rem* within the rule respecting priority of jurisdiction between Federal and State Courts.

7. In holding in all three cases that the actions brought by the United States were actions *in rem* within the rule respecting priority of jurisdiction between Federal and State Courts.

8. In holding that the United States was not entitled under Section 24 (1) of the Judicial Code to maintain actions in the Federal court to recover property to which it asserts title.

9. In holding in all three cases that the Federal court lacked jurisdiction to determine the title of the United States to the funds.

10. In failing to hold that the surplus assets in question became the property of the United States by virtue of the Soviet decrees of 1918 and the assignment by the Soviet Government.

11. In affirming the judgments of the District Court.

REASONS FOR GRANTING THE WRITS

The court below has held that a federal court is without power to entertain an action by the United States to recover, in an action in equity for an accounting, property to which it has derived title by an assignment from a friendly foreign power, on the ground that a state court has previously acquired jurisdiction over this property in an action

in rem. In so holding on the foregoing ground it has affirmed orders of the District Court based upon a holding that the assignment under which the United States claimed these funds did not include them and that the Soviet decrees which terminated the respective corporations and vested in the Soviet Government their assets and the claims of all their creditors and stockholders to such assets were ineffective to transfer to the Soviet Government title to these funds, since they were located in New York.

(1) The funds were the property of the Soviet Government and are now the property of the United States. Both sovereigns and their property are immune from suit without their consent, and neither sovereign had consented to the actions in the state court. Even if the state court could acquire jurisdiction of the property of a then unrecognized foreign sovereign without its consent, we submit that upon recognition and the concurrent transfer of the funds to the United States, the New York Supreme Court lost all power to deal with these funds.

The ruling of the Circuit Court of Appeals is also to the effect that the mere pendency of an action in a state court which, that court has held, has assumed jurisdiction *in rem* over the same property can defeat the jurisdiction of the federal court to adjudicate the title of the United States to these assets. This constitutes an interpretation of Section 24 (1) of the Judicial Code at variance

with the decisions in *United States* v. *McIntosh,* 57 F. (2d) 573 (E. D. Va., 1932) and *United States* v. *Inaba,* 291 Fed. 416 (E. D. Wash., 1923), which held that under this section federal courts must entertain an action instituted by the United States to recover its property despite the pendency of an action in a state court respecting the same property.[2] That when property which it claims is already the subject of litigation, a remedy is open to the United States other than participation in the pending litigation, has been stated by this court in the following language in *United States* v. *Lee,* 106 U. S. 196, 222:

> Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of *Carr* v. *United States,* already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction

[2] These two cases also held that a Federal Court may issue an injunction *pendente lite* to protect this property despite pending proceedings in the State court respecting such property.

> may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined.

The decision of the court below is at variance with this settled principle. It leaves open to the United States, as the only means of asserting its rights to this particular property, to enter its appearance in the pending actions in the State court. So to limit the rights of the United States is in practical effect in these cases to subject the United States to suit without its consent.

If the State court is not prevented from making any determination in the premises whatsoever by reason of the sovereign character of the property before it and the immunity of the United States from suit, it is at least prevented from making a complete determination. In these circumstances, we submit that this Court should determine whether the State court actions are of such a character that the custody assumed to have been taken by that court deprives the Federal court of jurisdiction to grant the relief which the United States seeks. Cf. *United States* v. *Lee, supra.*

The decision of the court below is that the State court has at all times had exclusive jurisdiction and control over these funds here in question. We believe that, even if the State court did at one time have such jurisdiction or control, it lost that con-

trol when it relinquished the funds and ordered the deposit to be made with the Bank of New York and the Manhattan Company as agents and depositaries of the insurance companies, and under instructions to pay out upon the order of "a court of competent jurisdiction." Within the meaning of this order, the Federal court, or another State court, might order the banks to pay out the funds. Had the Supreme Court of the State of New York intended to retain its exclusive jurisdiction and control over the funds, it undoubtedly would not have framed its order in such a way that in the future another court might make an order directing a payment of the funds. It follows, therefore, that when the State court ordered the deposits made in the banks, that court thereby lost its exclusive jurisdiction or control.

It did not subsequently reacquire such exclusive jurisdiction or control by virtue of any actions or proceedings now pending in the State court. Prior to the institution of any subsequent proceedings in the State court, all right, title, and interest in the surplus assets remaining after domestic creditors had been paid were appropriated by the Soviet Government, which at all times thereafter, and until November 16, 1933, remained the owner thereof. The Soviet Government as the owner has never consented to its property being subjected to the jurisdiction of the State court, and without its consent its rights therein cannot be adjudicated. Consequently the State court did not acquire any

jurisdiction, *in rem* or otherwise, by virtue of the later proceedings instituted therein. *Wulfsohn* v. *Russian Republic,* 234 N. Y. 372; see also *The Exchange,* 7 Cranch 116; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *Ricaud* v. *American Metal Co.,* 246 U. S. 304.

Further, it definitely appears that all three Russian insurance companies concerned herein—The Moscow Fire Ins. Co. which purported to maintain the later action against the Bank of New York and Trust Co., the Northern Ins. Co. of Moscow which purported to make the later assignment to the Manhattan Company for the benefit of creditors, and the First Russian Ins. Co. which claims the surplus assets in the hands of the Superintendent of Insurance—were nationalized and ceased to exist as Russian corporations, by virtue of decrees of the Soviet Government, prior to any and all proceedings now pending in the New York State courts. Thus, in one case there was no corporate plaintiff, in the second there was not any corporate assignor, and in the third there was no corporation which could claim the surplus assets in the hands of the Superintendent of Insurance. It therefore results that any proceedings purported to have been instituted by any of these nationalized Russian corporations could not have given the court any jurisdiction, *in rem* or otherwise, over the funds herein concerned.

Even if the State court did reacquire jurisdiction in the pending State court proceedings it is by no

means clear that such jurisdiction is *in rem* and not *in personam,* for in all three proceedings rights against the corporations themselves, and not against the fund as such, are being adjudicated.

Furthermore, it cannot necessarily be said that the instant suits by the United States are actions *in rem,* or that an adjudication of the rights of the United States by the Federal court would in any way interfere with any jurisdiction or control over the *res* by the State court. In the instant suits the United States is asking that the defendants account to it for any funds held by them and formerly belonging to the Soviet Government. Obviously, to allow the Federal court to pass upon the right asserted by the United States would not affect the State court proceedings. It may be that any judgment obtained herein by the United States would be required to be proved in the State court proceedings, but that does not mean that the United States has not sufficiently stated a cause of action in its bill of complaint in the Federal court, or that the instant suits should not be allowed to proceed to judgment.

In *Waterman* v. *Canal-Louisiana Bank Company,* 215 U. S. 33, 46, this Court said:

> If the Federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the

> court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus binding the executor personally, as was the case in *Payne* v. *Hook,* 7 Wall. 425, *supra,* and *Ingersoll* v. *Coram,* 211 U. S. 335, *supra.*

It is believed that the court below misconceived the effect of this decision, and that its attempt to distinguish it is untenable. The duty of the defendant in each of the present cases is, like that of the executor in the *Waterman case,* to pay over the fund to the parties lawfully entitled thereto. The Federal court has jurisdiction to determine who those parties are. In *Riehle* v. *Margolies,* 279 U. S. 218, in holding that an action in a State court might be maintained to adjudicate a claim against a debtor, concurrently with a proceeding in a Federal court to distribute the debtor's assets, and that the judgment so obtained would be binding in the Federal court, this Court stated:

> The contention that the judgment is not conclusive rests upon the argument that, because the appointment of the receiver draws to the appointing court control of the assets, and in the distribution of them among creditors there is necessarily involved a determination both of the existence of the claim and of the amount of the indebtedness, the federal court must have the exclusive power to make that determination. The argument ig-

nores the fact that an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. Insofar as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. Insofar as it determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*. Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 88–9. But the judgment of the state court does not purport to deal with the property. The sole question involved there was the existence and amount of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. *There is no inherent reason why the adjudication of the liability of the debtor in personam may not be had in some court other than that which has control of the res.* It is only necessary that in the receivership proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them. (Italics ours.)

The relief sought by the United States in the instant suits is similar to the relief sought by the plaintiff in *Riehle* v. *Margolies, supra.*

(2) Apart from the questions of local substantive law and prior jurisdiction involved, we submit that this Court should decide whether at the time of recognition by the United States, the Soviet Government owned the property which the United States claims has been assigned to it, and whether as a result of recognition our courts are required to give effect to that ownership. The assets assigned were placed in New York by the former Russian corporations for a special purpose, namely, as security for persons who entered into business transactions with them within the United States. This purpose has been fulfilled by the payment of such persons in full.[3]

By Soviet law, which is now conclusive on our courts as to the status of former Russian insurance corporations and their assets, the surplus funds here in question had been appropriated by the Soviet Government. If the decision of the District Court herein be correct, the United States Govern-

[3] The New York Court of Appeals in discussing the liquidation of the New York assets of the three Russian insurance companie here involved; stated as follows in *Matter of People* (*Russian Reinsurance Company*), 255 N. Y. 415, 427:

"The State of New York is not charged with a duty to wind up the business of these Russian corporations. In aid of domestic creditors, it winds up a branch of such a business conducted within its borders and in submission to its laws. (*Matter of People* [*Norske Lloyd Ins. Co.*], 242 N. Y. 148.) This done, its duty ends except to turn the surplus over to a competent custodian (Insurance Law, section 63)."

ment would be rendered unable to recover in any court the funds of these or any other former Russian corporations assigned to it by the Soviet Government. Such a situation has a bearing on the diplomatic relations between the United States Government and the Soviet Government.

(3) The District Court has interpreted the diplomatic interchange between the United States Government and the Soviet Government in a manner at variance with the interpretation placed on it by both of the high contracting parties. The Circuit Court of Appeals has declined to review this interpretation, although in a prior case it had indicated its approval of the interpretation now urged by the United States (see *State of Russia* v. *National City Bank*, 69 F. (2d) 44). The meaning of these diplomatic documents should be finally determined by this Court, for until such determination has been made the United States is hampered in its attempts to carry out its agreement with the Soviet Government to collect Russian assets in the United States which are not the subject of prior litigation as well as such assets which, as in these cases, are claimed to have been taken into the custody of a court in a pending action.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

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